

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**C.E.A NO. 67 OF 2007
DECIDED ON : 07.12.2007**

M/ S Indra Processors, Ajnala Road, Amritsar

...Appellants

versus

Commissioner of Central Excise, Jalandhar and anr.

...Respondents

**CORAM : HON'BLE MR. JUSTICE M. M. KUMAR
HON'BLE MR. JUSTICE RAKESH KUMAR JAIN**

Present: Mr. Sudeep Singh, Advocate,
for the appellant.

Mr. Sanjeev Kaushal, Advocate,
for the respondents.

M. M. KUMAR, J.

These are two appeals bearing Nos. 67 and 68 of 2007, filed under Section 35-G of the Central Excise Act, 1944 (for brevity "the Act"), which are directed against composite order dated 23.11.2006 passed by the Custom Excise and Service Tax Appellate Tribunal, New Delhi in Excise Appeals Nos. 5787-5788 of 2004. The Tribunal has dismissed the appeals filed by the appellants sustaining a preliminary objection that after omission of Section 3-A of the Central Excise Act, 1944 read with Rules framed thereunder, no proceedings could continue as there is no saving clause made by the Finance Act, 2001, which omitted Section 3-A of the Act.

Brief facts of the case are that the appellants are engaged in the process of man made fabrics with the aid of power and steam. During the period from December 1998 to November 1999, the appellants were working under the Compounded Levy Scheme which was framed under Section 3-A of the Act and Rule 96ZQ of the Central Excise Rules, 1944 (for brevity "the Rules"). Accordingly, the capacity of the appellants was determined and duty liability was fixed on the basis of size of stenter machine. The revenue had consistently taken the view that the Pollution Control Equipment attached to the stenter machine i.e galleries is treated as part of the stenter and the duty used to be demanded on that basis. The appellants applied for the abatement of duty for the period from 16.12.1998 to 31.01.1999 claiming that their factory remained closed for a period of more than seven days. The abatement claim was sanctioned vide abatement order dated 22.02.2000. However, in the order, the Commissioner imposed a condition that the amount to be adjusted towards duty and penalty imposed vide orders in original Nos. 131-153/AC/D/99 and 233/D/AC/2000. The appellants filed an appeal against the orders in original before the Commissioner (Appeals). The appeal was allowed vide order dated 30.08.2001. On further appeal preferred by the revenue, the Tribunal upheld the order of the Commissioner (Appeals). As a consequence, the order demanding duty on galleries was set aside and the appellants

became entitled to refund. Accordingly, they applied for the refund of an amount of Rs.3,36,606/- for the period from June, 1999 to November, 1999 on the amount of duty paid under protest on galleries. However, appellants received two show cause notices from the revenue proposing to reject the refund claim made by the appellants solely on the ground that the revenue did not accept the decision of the Tribunal holding that the length of galleries was not includable for the purpose of determining the annual capacity of production (Annexures R-1 and R-2). Thereafter, additional show cause notices incorporating the ground of recovering the duty from the custom were served and it was proposed to be rejected on the ground of unjust enrichment (Annexure R-3 and R-4).

The appellants filed their replies to the show cause notices and took the plea that no ground for rejection of their claim for refund was available as the decision delivered by the Tribunal holding that the length of galleries is not includable for determining annual capacity had already attained finality upto Supreme Court. They had not recovered the excise duty amount from their customer and therefore, the principles of unjust enrichment was not applicable. The adjudicating authority vide order 30.12.2003 sanctioned both the refund claims but held that the claim suffered from unjust enrichment. Accordingly, it was ordered that the amount be credited to the consumer welfare fund (Annexure R-5). On further appeal before the Commissioner (Appeals), Central

Excise, Jalandhar upheld the order passed in original holding that the appellants could not prove that they had borne the duty element and has not passed on the same to the buyers of goods (Annexure R-6). On further appeal before the Tribunal, the appellants again lost and the Tribunal took the view that once Section 3-A of the Act has been omitted from the Act, no proceedings would survive for adjudication and in that regard the Tribunal placed reliance on an earlier order passed by the Tribunal in the case of **M/S Shree Ambay Forgings Pvt. Limited v. CCE (2006) 75 RLT 919.**

After hearing the learned counsel at some length, we are of the considered view that the Tribunal has failed to consider the provisions of Section 38-A of the Act, which has been inserted by the Finance Act, 2001. According to Section 38-A where any rule, notification or order made or issued under this Act or any notification issued under any such rule is amended, repealed or superseded, then, unless a different intention appears, such amendment etc. must not effect any right, principle, application or liability acquired, accrued or incurred under the amended, repealed or superseded notification or order. The afore-mentioned provisions of Section 38-A reads thus :

“Section 38.A (Effect of amendments, etc. of rules, notifications or orders – Where any rule, notification or order made or issued under this Act

or any Notification or order issued under such rule, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not -

(a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect; or

(b) affect the previous operation of any rule, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, notification or orders so amended, repealed, superseded or rescinded; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under or in violation of any Rule, Notification or order so amended, repealed, superseded or rescinded; or

(e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded.”

Thus, it is clear that the right to seek refund of the amount of duty paid had accrued to the appellants under Section 3 - A of the Act, which has subsequently been repealed and therefore, the right to refund would not

extinguish nor the proceedings concerning such a right would lapse with the repeal of Section 3-A of the Act. This Court in the case of “**M/S Shree Bhagwati Steel Rolling Mills v. C.C.E” 2007 (207) ELT 58**, has held that the pending proceedings were not to lapse by mere virtue of omission of Section 3-A of the Act. Therefore, the Tribunal ought to have decided the issue on merit, after taking into consideration various pleas raised by the appellants including the plea that the incidence of duty has not been passed on to the consumer because their sale price continued to be the same which was prevailing before the grant of benefit of duty under Section 3-A of the Act read with rule 96ZQ of the Rules. The Tribunal should have also decided other issues including the issue as to whether claim of refund made by the appellants was time barred.

In view of the above, the impugned order dated 23.11.2006 passed by the Tribunal is set aside and the appeals of the appellants are accepted. The matter is restored back on the file of the Tribunal for deciding the appeals of the appellants afresh in accordance with law expeditiously, preferably within a period of four months from the date a certified copy of this order is received by the Tribunal.

(M. M. KUMAR)
JUDGE

DECEMBER 07, 2007
shalini

(RAKESH KUMAR JAIN)
JUDGE

